

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**STEPHANIE SUE WALKER**

Claimant

VS.

**U.S.D. NO. 259**

Self-Insured Respondent

)  
)  
)  
)  
)  
)  
)

Docket No. **1,007,493**

**ORDER**

Respondent requests review of the May 16, 2007 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on September 21, 2007.

**APPEARANCES**

Michael L. Snider of Wichita, Kansas, appeared for the claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The parties agreed claimant had suffered a compensable work-related injury but did not agree upon the nature and extent of her disability. The Administrative Law Judge (ALJ) found claimant sustained a 24 percent functional impairment to the body as a whole based upon an average of Drs. Paul Stein and Pedro Murati's ratings.<sup>1</sup>

Respondent acknowledges that the ALJ's Award is dated May 16, 2007, and its Application for Review Before the Workers' Compensation Appeals Board was not filed until June 6, 2007. Respondent states that it did not receive a copy of the ALJ's May 16, 2007 Award until June 6, 2007, when it requested a copy from claimant's attorney after

---

<sup>1</sup> The average of Drs. Stein and Murati's ratings correctly calculates to 25.5 percent.

receiving a K.S.A. 44-512a Demand for Compensation from claimant on June 5, 2007. Respondent requests permission to file its application for review out of time.

If it is determined the Board has jurisdiction to hear its request for review, the respondent requests review of the nature and extent of disability. Respondent argues claimant is entitled to a 16 percent functional impairment based upon Dr. Stein's opinion and rating. In the alternative, respondent argues Drs. Estivo, Stein and Murati's ratings should be averaged together which results in an 18.66 percent functional impairment.

Claimant argues she is entitled to a 35 percent functional impairment based upon Dr. Murati's opinion and ratings. In the alternative, claimant requests the ALJ's Award be affirmed.

The issues for Board determination are whether it has jurisdiction to review the May 16, 2007 Award and, if so, the nature and extent of claimant's functional impairment.<sup>2</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board must first determine whether it has jurisdiction to review the ALJ's May 16, 2007, Award. Pursuant to statute, the effective date of an award is "the day following the date noted in the award."<sup>3</sup> Excluding Saturdays, Sundays, and legal holidays, parties have 10 days to request this Board to review an administrative law judge's order or award.<sup>4</sup>

Respondent's attorney states that he did not receive a copy of the May 16, 2007, Award from the ALJ. The Award indicates that a copy was mailed to both claimant's and respondent's attorneys. Although claimant received a copy of the ALJ's Award by mail the respondent's attorney states that his office did not. Respondent's attorney learned of the Award on June 5, 2007 upon receipt of a K.S.A. 44-512a Demand for Compensation from claimant. Respondent's attorney contacted claimant's attorney and requested a faxed copy of the Award on June 6, 2007, and then faxed a request for Board review on that

---

<sup>2</sup> Claimant is not alleging she is entitled to a work disability as she has been taken off work for a personal medical condition unrelated to the injuries suffered in her work-related accident.

<sup>3</sup> K.S.A. 44-525(a).

<sup>4</sup> K.S.A. 2003 Supp. 44-551(b)(1).

same date. The respondent's Application for Review Before the Workers' Compensation Appeals Board was stamped received by the Division of Workers Compensation on June 6, 2007. In order to rebut the presumption that the Award was mailed and received, respondent's counsel attached his affidavit to the Application for Review Before the Workers Compensation Appeals Board, which states:

1. I, Robert G. Martin, am an attorney representing USD 259, self-insured respondent, in the matter of Stephanie S. Walker v. USD 259.
2. I have participated throughout the litigation of this workers compensation claim.
3. On or about June 5, 2007, I received correspondence from Michael L. Snider, claimant's counsel, requesting that payment be made within twenty (20) days on an Award issued by Administrative Law Judge Nelsonna Potts Barnes on May 16, 2007.
4. At that time, I had not received and did not know Judge Barnes had issued an Award in claimant's favor.
5. On June 6, 2007, I contacted claimant counsel and only then learned of Judge Barnes' Award.
6. In an effort to perform due diligence, I have reviewed my billing records for the months of May and June. Said records reflect no entry regarding either the matter of *Stephanie D. Walker v. USD 259* or receipt of Judge Barnes' May 16, 2007 Award.
7. Furthermore, I have consulted with members of my staff to determine whether or not they received Judge Barnes' May 16, 2007 Award, and none have done so.
8. To date, my office has not received a copy of the Award issued by Administrative Law Judge Barnes on May 16, 2007 from the Kansas Department of Human Resources Division of Workers Compensation.
9. Prior to June 6, 2007, neither I nor my office knew Judge Barnes had issued an Award in the matter of *Stephanie D. Walker v. USD 259*.

Likewise, respondent's attorney's legal assistant's affidavit was attached to the Application for Review Before the Workers Compensation Appeals Board, and states:

1. I, Patricia Bates, am a legal assistant to Robert G. Martin.

2. I have assisted Mr. Martin throughout the litigation of *Stephanie D. Walker v. USD 259*.
3. I have not now nor have I ever received a copy of Administrative Law Judge Nelsonna Potts-Barnes' Award dated May 16, 2007.
4. In an effort to perform due diligence, I have reviewed my billing records for the months of May and June 2007. Neither month reflects an entry for work performed in the case of *Stephanie D. Walker v. USD 259*.
5. Furthermore, no time entries reflect receipt of an Award from Administrative Law Judge Barnes of the May 16, 2007 Award.

Respondent argues that the *Johnson*<sup>5</sup> and *Nguyen*<sup>6</sup> cases require the Board to treat its request for review as timely. The Board agrees. *Nguyen* indicates that due process requires notice be given the parties and that both mailing and receipt of the Order are required to constitute notice.

IBP argues that the mere filing of the award by the ALJ is all that is required to commence the running of the time limit for filing an application for review. [Citation omitted.] IBP is correct where the filing of the award is accompanied by notice to the parties. **However, the filing of an award is not notice to the parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice.**<sup>7</sup> (Emphasis added.)

Accordingly, receipt of an award is imperative. Respondent's attorney, who is an officer of the Court, represents that he did not receive the May 16, 2007 Award until obtaining a copy from claimant's counsel on June 6, 2007. The Board finds no reason to doubt respondent's attorney's contention. Consequently, the Board finds respondent did not receive the May 16, 2007 Award on a timely basis and, therefore, respondent did not receive notice as required by due process. The Board concludes the June 6, 2007, request for review was timely. Consequently, the Board has jurisdiction to review the May 16, 2007, Award.

At the time of the regular hearing, Stephanie Walker was 62-years-old and was receiving Social Security benefits due to a health condition unrelated to her accidental injuries.

---

<sup>5</sup> *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 135 P.3d 1203 (2006).

<sup>6</sup> *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

<sup>7</sup> *Id.* at 589.

Claimant worked as a teacher for the respondent since 2000. She worked with special needs children that were behaviorally and emotionally disturbed. On October 2, 2002, claimant was walking down the hallway when she slipped in water and fell backwards onto her back. She injured her neck, back, shoulders, right hand and fingers, right knee and ankle. Claimant sought treatment at Immediate Care and was referred to Dr. John P. Estivo.

Claimant's treating physician, Dr. Estivo, reviewed medical records, examined and evaluated the claimant on November 18, 2002. The doctor diagnosed claimant as having a cervical, thoracic and lumbar spine strain. He ordered anti-inflammatory medications, physical therapy and an MRI of the right shoulder and lumbar spine. Claimant returned for a follow-up visit on January 2, 2003. The MRI of the lumbar spine revealed a slight bulging disk at L1-2 and the MRI of the shoulder revealed a partial rotator cuff tear. Dr. Estivo diagnosed claimant with rotator cuff tendinitis with a partial thickness rotator tear, and a cervical and lumbar spine strain. On February 17, 2003, Dr. Estivo placed a restriction of no overhead use of her right arm. Based upon the *AMA Guides*<sup>8</sup>, Dr. Estivo rated claimant's cervical spine strain at 5 percent. The doctor released her with restrictions of no restraining of students.

Claimant returned to see Dr. Estivo on March 24, 2003, due to complaints of cervical spine pain and numbness into her right arm. The doctor referred her for an MRI of the cervical spine which revealed degenerative disk changes at C5-6. The last time Dr. Estivo saw the claimant was on March 31, 2003. The doctor's rating and restrictions did not change and claimant was released to return to work.

The claimant returned to work and finished out that school year and the 2004 school year. She then took a leave of absence from work.

After claimant was released by Dr. Estivo she received additional treatment for her cervical complaints. She received facet injections and then radio-frequency medial branch neurolysis. She also had surgery on her right small finger to repair the ligament and joint capsule. And she went to her chiropractor on numerous occasions for adjustments. Claimant testified that she is currently having pain in her neck, right shoulder, right hand, finger, ribs and back.

On June 11, 2003, Dr. Paul S. Stein performed an examination and evaluation of claimant at the request of the respondent's attorney. Based upon his examination, the doctor diagnosed claimant with soft tissue injury to the cervical spine as result of her

---

<sup>8</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

employment with respondent. Dr. Stein opined claimant suffered a 5 percent permanent partial whole person impairment for her neck, shoulders and back based upon the *AMA Guides*, DRE Cervicothoracic Category II. Dr. Stein further opined claimant suffered a 5 percent permanent partial whole person impairment for her low back based upon the *AMA Guides*, DRE Lumbosacral Category II.

Dr. Stein opined claimant has some symptomatology and examination findings in the left hand consistent with possible carpal tunnel syndrome but no evidence that she sustained injury to her left hand as a result of her work-related injury. He further opined that claimant has symptomatology and findings of carpal tunnel syndrome in her right hand as well as thumb and fifth finger that are causally related to her work injury. Dr. Stein rated claimant's right carpal tunnel syndrome at 10 percent to the right upper extremity. The doctor also rated claimant's right small finger at 10 percent and thumb at 3 percent. The small finger translates to a 1 percent to the hand and the thumb translates to a 1 percent to the upper extremity. The total right upper extremity impairments (10 +1 +1) combine for a 12 percent to the right upper extremity. The 12 percent right upper extremity translates to a 7 percent whole person impairment. Using the combined values chart, claimant's whole person impairments (5 percent cervicothoracic region, 5 percent lumbar region and 7 percent right extremity) combine for a 16 percent whole person functional impairment.

Dr. Stein imposed permanent restrictions that claimant avoid repetitive overhead activity or activity requiring rapid movements of the neck and placement of the neck in strained positions. Claimant should avoid lifting more than 30 pounds with any single lift up to twice per day, 20 pounds occasionally but not continuously, and 10 pounds frequently but not continuously. Claimant should avoid with any two bending and twisting of the lower back. He placed upper extremity restrictions on the claimant of avoiding intensive repetitive work activity with the right hand as well as limited use of vibratory or power tools.

Dr. Pedro A. Murati examined claimant on August 23, 2006, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with the following: (1) right patellofemoral syndrome; (2) myofascial pain syndrome affecting the right shoulder girdles, thoracic and cervical paraspinals; (3) lumbar strain; (4) bilateral carpal tunnel syndrome, right directly related to the fall and left secondary to overuse; (5) bilateral ulnar cubital syndrome secondary to repetitive activity; and, (6) status post right fifth digit surgery.

Dr. Murati opined that for claimant's myofascial pain syndrome affecting her cervical paraspinals claimant suffered a 5 percent whole person functional impairment based upon the *AMA Guides*, DRE Cervicothoracic Category II. For her myofascial pain syndrome affecting her thoracic paraspinals claimant suffered a 5 percent whole person functional impairment based upon DRE Thoracolumbar Category II. For claimant's lumbar strain Dr.

Murati opined claimant suffered a 5 percent whole person functional impairment based upon DRE Lumbosacral Category II.

Dr. Murati further rated claimant's right carpal tunnel syndrome at 10 percent to the right upper extremity, her right ulnar cubital tunnel syndrome at 10 percent to the right upper extremity and 4 percent for loss of range of motion of her right shoulder. The right upper extremity ratings combine for a 13 percent whole person functional impairment.

Dr. Murati rated claimant's left carpal tunnel syndrome at 10 percent to the left upper extremity and her left ulnar cubital tunnel syndrome at 10 percent to the left upper extremity. The left upper extremity ratings combine for an 11 percent whole person functional impairment.

Dr. Murati rated claimant's right patellofemoral syndrome at 5 percent to the right lower extremity which converts to a 2 percent whole person functional impairment. Based upon the *AMA Guides*, the doctor concluded claimant's whole person ratings combined for a 35 percent whole person functional impairment.

The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no ladders, squatting, crawling, kneeling or repetitive foot control of the right, no heavy grasping with both hands, no above shoulder level work with both arms, no lift/carry/push/pull greater than 10 pounds and that occasionally. Claimant should rarely bend, crouch, stoop and climb stairs as well as occasional repetitive grasping or grabbing with both hands. She should limit frequent sitting, standing, walking and driving, lifting, carrying, pushing and pulling greater than 5 pounds and repetitive hand controls. Claimant should also avoid awkward positions of the neck, no work more than 18 inches away from the body with both extremities, use wrist splints while working at home on both hands, no use of hooks, knives or vibratory tools with both hands and no lifting below knuckle height. Keyboarding should be limited to 10 minutes on and then 50 minutes off.

The sole issue is the extent of claimant's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.<sup>9</sup> The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>10</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical

---

<sup>9</sup> K.S.A. 44-510e(a).

<sup>10</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>11</sup>

In *Bryant*<sup>12</sup>, the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant sustained injuries to her neck, upper and lower back, which are nonscheduled injuries, all of her injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e.

As previously noted, Dr. Stein opined that all of claimant's injuries combined for a 16 percent whole person functional impairment. Conversely, Dr. Murati opined that all of claimant's injuries combined for a 35 percent whole person functional impairment. However, Dr. Murati rated claimant for injuries to her left carpal tunnel, left cubital tunnel and right cubital tunnel which he attributed to repetitive trauma. The difficulty with that conclusion is that claimant never claimed she suffered repetitive trauma and only alleged injuries received from a single traumatic incident. Moreover, she never complained of problems with her left upper extremity. Accordingly, Dr. Murati's rating will be recalculated without the percentages he included for claimant's left carpal tunnel, left cubital tunnel and right cubital tunnel.

Dr. Murati rated claimant's left carpal tunnel syndrome at 10 percent to the left upper extremity and her left ulnar cubital tunnel syndrome at 10 percent to the left upper extremity. These left upper extremity ratings combine for an 11 percent whole person functional impairment. Consequently, Dr. Murati's rating will not include the 11 percent whole person functional impairment he attributed to claimant's left upper extremity.

Dr. Murati further rated claimant's right carpal tunnel syndrome at 10 percent to the right upper extremity, her right ulnar cubital tunnel syndrome at 10 percent to the right upper extremity and 4 percent for loss of range of motion of her right shoulder. Eliminating the 10 percent for the right ulnar cubital tunnel syndrome the right upper extremity ratings combine for a 14 percent right upper extremity rating which combine for an 8 percent whole person functional impairment. This results in whole person ratings from Dr. Murati for 2

---

<sup>11</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

<sup>12</sup> *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).



percent for claimant's right patellofemoral syndrome, 5 percent based upon the AMA *Guides*, DRE Cervicothoracic Category II, 5 percent based upon DRE Thoracolumbar Category II, 5 percent based upon DRE Lumbosacral Category II, and 8 percent for her right upper extremity. These ratings combine for a 23 percent whole person functional impairment.

The Board will give equal weight to Dr. Stein's opinion and Dr. Murati's opinion as modified. Consequently, the claimant is entitled to compensation for a 19.5 percent whole person functional impairment.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 16, 2007, is modified to reflect claimant is entitled to compensation for a 19.5 percent whole person functional impairment.

The claimant is entitled to 3.15 weeks of temporary total disability compensation at the rate of \$432 per week or \$1,360.80 followed by 80.93 weeks of permanent partial disability compensation at the rate of \$432 per week or \$34,961.76 for a 19.5 percent functional disability, making a total award of \$36,322.56 which is due and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2007.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned Board members agree that due process requires the Board to take jurisdiction of this appeal despite it having been filed more than 10 days from the effective date of the ALJ's Award. We disagree, however, with the majority's award of a 19.5 percent permanent partial general disability which combines claimant's scheduled injuries with her general body disabilities. Instead, *Casco* requires separate awards of permanent partial disability compensation for each of the scheduled injuries under K.S.A. 44-510d and another for the general body disability under K.S.A. 44-510e.<sup>13</sup>

---

BOARD MEMBER

---

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant  
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

---

<sup>13</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 7, 154 P.3d 494 (2007).